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No. 80-2150

In the Supreme Court of the United States

October Term, 1981

DONALD FINNEGAN, *et al.*,
Petitioners,

vs.

HAROLD D. LEU, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE LEGISLATIVE AND JUDICIAL HISTORY SUPPORTS PETITIONERS' POSITION

It is clear from reading the briefs of the Respondents, and the three *Amici* that no one agrees on the extent and meaning of the protections and safeguards afforded by §101(a)(2) and §609 of the LMRDA, 29 U.S.C. §411 (a)(2) and 29 U.S.C. §529 respectively. In particular each has pulled from the LEGISLATIVE HISTORY to arrive at the rule which they feel to be appropriate in this case and each has argued with confidence and assertiveness that its interpretation is correct. What is paradoxical is the

extent to which they disagree. Respondent argues that the Court should affirm based upon the appointed-elected distinction (pages 7-21 of its brief). *Amici Curiae* Association for Union Democracy argues in support of Petitioners that no distinction can be made between appointed and elected officials but qualifies it by stating that in certain circumstances valid restrictions on protected expression will be limited to top level appointees who must be trusted to act with a high degree of independence and discretion (page 18 of its brief). *Amicus Curiae* National Labor Law Center assumes a similar position but argues for affirmance by stating that the lower courts reached the correct result but on the basis of incorrect reasoning and similarly suggests that the responsibilities of the appointive union representatives must be analyzed and his involvement in policy-making weighed (page 4 of its brief). Finally, *Amicus Curiae* AFL-CIO asserts that the courts should reject any of the *broad swept* approaches set forth by Petitioners or Respondents and instead vigorously opposes Petitioners' position and elaborately urges the court to adopt a *broad swept* approach that removal from an appointed position after a union election is neither discipline within the meaning of §609 or infringement under §101(a)(2), in this "*particular context*" (pages 7-22 of its brief).

The AFL-CIO further states at page 5 of its brief that the words in the statute should be interpreted as

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1. This is not the first time the AFL-CIO has vigorously opposed matters relating to the Bill of Rights of union members. The LEGISLATIVE HISTORY reflects that the AFL-CIO contended in 1959 that there was no need for a Bill of Rights. See Supplement to Testimony by Senator McClellan before the House Education and Labor Committee relative to labor's Bill of Rights, II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1294 (2). The AFL-CIO was so opposed to the Bill of Rights that Senator Goldwater commented for the LEGISLATIVE HISTORY how inconsistent the position of the AFL-CIO was. II LEGISLATIVE HISTORY 1352-53.

"taking their ordinary, *contemporary*, common meanings (*Perrin v. United States*, 444 U.S. 37, 42 (Emphasis supplied))". While the AFL-CIO has emphasized the word contemporary, Petitioners feel it is equally important to emphasize the word "ordinary" and "common".

In referring to §101(a)(1) and (2) and in §609 it is important to note that the protections are directed to "every member" and encompass the right to express "any view". This is qualified only by the right of the labor organization as an institution to enforce reasonable rules as to the responsibility of every member toward the organization. Indeed §609 states that it shall be unlawful to fine, suspend, expel, or otherwise discipline "any" of its members for exercising "any" right to which he is entitled under the provisions of this Chapter. Surely the words "every" and "any" were intended by Congress to have their ordinary and common meaning. To carve out an exception for members who are appointed business agents who campaign or run for office flies in th face of the common and ordinary meaning of the words "any" and "every". The LEGISLATIVE HISTORY does not reflect an intention to carve out such an exception and the debate sheds little light on the LEGISLATIVE HISTORY OF THE BILL OF RIGHTS from the House point of view.[2] However, the LEGISLATIVE HISTORY does reflect that several senators including Senator Kennedy stated for the LEGISLATIVE HISTORY that the enumeration of certain rights was not intended to have the effect of excluding other rights.[3] Thus

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2. See Rothman, *Legislative History of the Bill of Rights for Union Members*, Volume 45 MINNESOTA LAW REVIEW 199 at 208.

3. *Id.* at 210; See also remarks of Senators Cooper and Kennedy at II LEGISLATIVE HISTORY 1233 (1). Senator Holland also remarked that, "It seems to me that such reference should be added, to make complete the showing that nothing is excluded by the inclusion of the rights which are included, or the details which are included in *any* of the sections." (Emphasis added)

(Continued on following page)

whenever there was a concern that the statute might be interpreted to exclude some rights or some individuals specific mention was made for the record.[4]

Indeed it appears that the only discussion about excluding officers from the coverage of the Bill of Rights dealt with §101(a)(5). Moreover, little discussion of this provision took place on either floor of Congress. However the conference report and chief conferees all made clear that §101(a)(5) was not intended to apply to suspension of a union member's status as an officer of the union.[5] Petitioners do not dispute that officers were not intended to be covered by this section and the courts are virtually unanimous that such procedural rights do not apply.[6] See

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Footnote continued—

II LEGISLATIVE HISTORY 1233 (2). Senator Church also remarked that the redrafting was not for the purpose of weakening or limiting the fundamental rights but was only necessary to eliminate the unnecessary provisions which would harass and obstruct the achievement of that end. Senator Church believed that the redrafting of the Bill improved the guarantees of the fundamental rights which were sought and stated that, "We have not altered the objectives sought by the distinguished Senator from Arkansas. I believe that the Bill has not been weakened but, instead, improved for the benefit of the working people and for the benefit of the public at large." II LEGISLATIVE HISTORY 1233 (2) (3). Thus the LEGISLATIVE HISTORY reflects that words contained in the specific rights sections should be read broadly rather than in the restricted sense which *Amici* AFL-CIO urges upon the court.

4. In the same vein, Senator Goldwater expressed grave misgivings concerning the retention of the "reasonable rules" proposal, because it would preserve the union's right to limit member's rights merely by constitutional or rules provision. In rebuttal, Senator Kuchel stated for the LEGISLATIVE HISTORY that this "was not the intention of his group." Rothman, *Legislative History of the Bill of Rights for Union Members*, 45 MINNESOTA LAW REVIEW 199 at 211.

5. Rothman *Id.* at 216.

6. Congress' primary concern was that §101(a)(5) should not bar summary removal of union officials suspected of malfeasance in order to protect the union as an institution from harm pending the outcome of the trial and charges on malfeasance. *Grand Lodge v. King, infra; Wood v. Dennis, infra.*

Grand Lodge v. King, 335 F.2d at 340, 56 L.R.R.M. at 2642; *Wood v. Dennis*, 489 F.2d at 857, 84 L.R.R.M. at 2664.

Petitioners submit that Congress assumed that the word "members" in §101(a)(2) and §609 of the LMRDA included officers and officials as well. If Congress had not assumed this then mention would have been made that officer members were being excluded. To this extent Petitioners agree with the analysis of the LEGISLATIVE HISTORY set forth in *Amici Curiae* Association for Union Democracy's brief at pages 5-13.

Moreover, the AFL-CIO argues that, because the right-privilege distinction was still alive and kicking in 1959, Congress must have intended to allow discharge of union officers because of their exercise of free speech rights (pages 18-19 of its brief). While it is not clear how much of that doctrine was left in 1959 it is clear that Congress' intent in adopting the Bill of Rights was to apply the Constitutional Bill of Rights in the union context.[7] Moreover, Congress did not have specific restrictions on free speech rights in mind; rather, it intended that the courts should decide on a case-by-case basis what was reasonable.[8] The question, therefore, is not to be determined by deciding how far the court had travelled by 1959 on the road from *Adler* to *Pickering* as suggested by the AFL-CIO.

After all, Congress passed the Civil Rights Act of 1871 long before the "laws of the United States" were under-

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7. See Remarks of Senator Griffin at II LEGISLATIVE HISTORY 1566 (3).

8. See Senator Javitz' speech at II LEGISLATIVE HISTORY 1238(2); See also Remarks of Senator Kuchel at II LEGISLATIVE HISTORY 1232(2).

stood to forbid segregation in education (*Brown v. Board of Education*, 347 U.S. 483 (1954)), yet no one could contend that 42 U.S.C. §1983 cannot be used to attack dual school systems or remedy public employer discrimination against non-citizens, *Sugarman v. Dougall*, 413 U.S. 634 (1974); *In Re Griffiths*, 413 U.S. 717 (1973). The same Act was passed long before "white citizens" were understood to enjoy "rights" of many kinds, denial which to blacks are actionable under 42 U.S.C. §1981. Where Congress' purpose was to provide a statutory guarantee of constitutional rights, the "rights" are not frozen into place as of the time of the passage of the statute.[9]

Indeed, to accept the AFL-CIO's argument would mean that, because the court had not yet decided *New York Times v. Sullivan*, 376 U.S. 254 (1964), the LMRDA would provide no protection against discipline based on false statements; yet the circuits which have considered that issue have held to the contrary, *e.g.*, *Salzhandler v. Caputo*, 316 F.2d 445 (2nd Cir., 1963). Moreover, because the First Amendment doctrines of vagueness, overbreadth and chilling effect were at best at an early stage of development, they would be useless in LMRDA litigation, though the Courts of Appeal have borrowed freely from them for reasoning by analogy, e.g., *Semancik v. UMW*, 466 F.2d 144 (3rd Cir., 1972); *Mallick v. IBEW*, 644 F.2d 228 (3rd Cir., 1981); *Turner v. Machinists Lodge 1894*, 590 F.2d 409 (2nd Cir., 1978). Thus the mere fact that the state of First Amendment law was less

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9. Section 1983 incorporates the Fourteenth Amendment requirement that the state not engage in wholly irrational or "suspect" classifications, which would constitute a denial of "the equal protection of the law." For an analysis of this court's changing approach in evaluating equal protection claims, *see* Gunther, Foreward: *In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

developed in 1959 than it may be presently should not bar recognition of statutory protections.[10] The special circumstances of union democracy demand more protection for union appointees than for public employees, not less.[11]

II. PETITIONERS ARE NOT REQUESTING THAT A CIVIL SERVICE RULE BE ADOPTED TO PROTECT APPOINTED OFFICIALS.

Both Respondents (at page 20 of its brief) and the AFL-CIO (at pages 4 and 20) contend that prohibiting the retaliatory discharges of the Petitioner business agents would allow them to stay on the union payroll forever. Indeed the AFL-CIO goes so far as to say that a "civil service" rule is being requested. §101(a)(2) doesn't impose a civil service system on unions anymore than Title VII of the Civil Rights Act or Section 8(a) of the National Labor Relations Act imposes a civil service system on private corporations, or the First Amendment imposes one on public employers. This is the *Wambles* fallacy that Petitioners specifically criticized at page 24 of their brief. The proviso to §101(a)(2) permits the labor organization as an institution to submit such members' conduct to reasonable rules with respect to meetings, deliberations, etc. Unions can remove officers for misconduct and malfeasance and are only proscribed from doing so because of the exercise of Title I rights.[12]

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10. AFL-CIO contends that denial of the union death benefit because of free speech would violate Title I (Brief at 9 footnote 5). However, the extent to which "unconstitutional conditions" could be attached to the receipt of Social Security benefits was at least an open question in 1959. See *Fleming v. Nestor*, 363 U.S. 603 (1960).

11. See Petitioners' Brief at 22-27 and *Amici Curiae* Association for Union Democracy's brief at 7-13.

12. *Sewell v. Machinists*, 445 F.2d 545 (5th Cir., 1971), *cert. denied*, 404 U.S. 1024 (1972).

Moreover, the AFL-CIO suggests in its summary of argument that different rules might be applied to discharge of appointees based on criticism, rather than support, of incumbents or their policies, or for persons who were elected to their positions. See pages 2 through 4 of their brief. Logically, however, this distinction disappears in its substantive argument for the rationale it advances would cover all situations equally. It is virtually impossible to preclude relief in the instant case while preserving it for the factual patterns set forth by the AFL-CIO. The AFL-CIO's reasoning is illogical because it appears to apply only to insurgents elected to office who wish to remove incumbents who oppose them. For if the rationale is applied to incumbents who are reelected, then surely incumbents can utilize it as an excuse to discharge or discipline any officials who have in the past criticized their actions, failed to support them, or who the incumbents fear may be about to criticize their policies or to oppose them in some way. What the AFL-CIO has conveniently done is to assume factual patterns which appear to be more appealing for relief but which logically cannot be justified.[13]

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13. Moreover the AFL-CIO has assumed in its analysis a factual pattern which does not exist, i.e., Leu's election evidenced a mandate by the members of the union. See n. 14.

III. THE FACTS IN THIS CASE DEMONSTRATE THAT UNION DEMOCRACY IS NOT BEING FOSTERED BY PERMITTING THE RETALIATORY DISCHARGES OF THE APPOINTED BUSINESS AGENTS BECAUSE THIS CASE REPRESENTS A FACT SITUATION CONTRARY TO THE FACT SITUATION ASSUMED BY RESPONDENT, AMICUS CURIAE AFL-CIO AND AMICUS CURIAE NATIONAL LABOR LAW CENTER.

The National Labor Law Center sets forth at pages 17 through 19 of its brief certain alleged undisputed facts. While it may be undisputed and true that the business agents of IBT Local 20 were full time salaried employees appointed by the local president, and under the union by-laws, serving at the pleasure of the president, most of the remaining assumptions and facts assumed by the National Labor Law Center are erroneous. At best the record is unclear and this case must be remanded to trial to determine:[14]

1. Whether the joint resignation of all business agents in 1974 upon the election of the new president indicated an understanding that it was the prerogative and practice for a president to appoint new business

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14. While it is true that Leu won the presidency of Local 20, it is not true that the membership endorsed his policies and programs and neither is it true that democratic purposes of the Labor-Management Reporting and Disclosure Act demand that elected union officers be permitted to remove appointed employees of the union who oppose them. Leu was declared the victor in this election by a mere 29 votes out of 3,500 and during a turnout for an election which was very poor due to a blizzard which hit the Northwest Ohio area. *Marshall v. Teamsters Local 20*, 611 F.2d 645, 103 L.R.R.M. 2111 (6th Cir., 1979). Brown's entire slate was elected to the other union positions. Moreover Leu was only able to bring about his slim margin of victory by accepting and receiving thousands of dollars of employer contributions for his campaign and ultimately after an investigation by the Secretary of Labor the election was overturned but too late to benefit the business agents in the instant action.

agents at the beginning of his administration or whether the joint resignation was a deliberate attempt by Leu after losing the supervised rerun election to throw the local union into trusteeship?

2. Whether the Stewards' Council is the legislative and long-range policy-making body for the local union or whether that is a function actually carried out by the Executive Board and officers of Teamsters Local 20?

3. Whether the business agents conduct collective bargaining negotiations or whether the business agents are on a shop committee composed of stewards and rank-and-file members who conduct such negotiations?

4. Whether the business agents make a determination whether to take a grievance to arbitration or whether the Executive Board of Teamsters Local 20 makes such a determination?

5. Whether business agents have substantial responsibility for and discretion in the enforcement of the contracts or whether this responsibility is basically handled by shop stewards and chief stewards?

6. Whether the Stewards' Council is small or very large comprising 800 to 1,000 stewards and whether the 15 business agents' vote would directly control the president's policies or whether their seat on the council is more of a voice and freedom of expression at such Stewards' meetings?

7. Whether the business agents negotiate the freight collective bargaining agreements or whether these collective bargaining agreements are actually negotiated by a master freight negotiating committee at the national level?

8. Whether Leu's campaign was based upon a direct attack of the business agents' performance or an attack against the Brown slate officers all of whom were elected?

9. Whether the business agents engage in organizing or whether organizing was actually performed by a full time business agent who successfully increased the membership of Local 20 by over 1,000 to 2,000 new members in less than two years?[15]

Similarly the AFL-CIO also assumes crucial facts in setting forth its rather detailed argument that interpretation of the LEGISLATIVE HISTORY requires that discharges of appointed officials in the election context is not discipline within the meaning of §609 or an infringement within the meaning of §101(a)(2). The seemingly logical and legalistic interpretation of the LEGISLATIVE HISTORY disappears when one focuses on the qualifier utilized by the AFL-CIO, "in this particular context." The thrust of this argument assumes that Leu received a mandate of the union membership when in fact the contrary is true. See note 14.

The context which the AFL-CIO is alluding to is some non-retaliatory, non-disciplinary situation following an election whereby an insurgent reformer receives some sort of mandate from the membership endorsing the removal.[16] In the retaliatory context, the AFL-CIO appears to argue for protection of appointed officials. But if the discharge is retaliatory it doesn't matter in which context it arises in, for if it is based upon the exercise of the

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15. Petitioners submit that a trial will show that the latter half of each question is actually the case.

16. It is doubtful that such a non-retaliatory situation could ever exist following a union election.

rights intended to be protected by Landrum-Griffin it cannot be justified. *Grand Lodge v. King*, 335 F.2d 340, 56 L.R.R.M. 2639 (9th Cir., 1959), *cert. denied*, 379 U.S. 920, 57 L.R.R.M. 2512 (1964); *DeCampli v. Greeley*, 293 F. Supp. 746, 69 L.R.R.M. 2786 (D.N.J. 1968); *Retail Clerks Union, Local 648 v. Retail Clerks International Association*, 299 F. Supp. 1012, 70 L.R.R.M. 3366 (D.D.C. 1969); *George v. Bricklayers Union*, 225 F. Supp. 239 (E.D. Wisc. 1966); *Price v. United Mine Workers*, 376 F. Supp. 1015, 86 L.R.R.M. 2577 (D.D.C. 1974); *aff'd without opinion*, 515 F.2d 1018 (D.C. Cir., 1975), 90 L.R.R.M. 2844; *Alvino v. Bakery Workers Union*, 46 L.R.R.M. 2812 (D.D.C. 1910), approved in *Bakery & Confectionary Workers International Union v. Ratner*, 335 F.2d 691, 56 L.R.R.M. 2432 (D.C. Cir., 1964).

In short the Respondents and their *amici* argue that, even assuming the adoption of a construction of the statute providing some protection for the rights of union members who hold office, the decision below should be affirmed.[17] Their briefs in this regard are written as if there has been a trial, and that the clearly erroneous standard would be applicable. They simply recite favorable portions of the record and they ignore contradictory parts. See J.A. 54-61, Deposition of Richard Eddington, page 69; and the Deposition of Harold D. Leu at page 82. The standard on summary judgment, however, is whether the Defendants are entitled to a judgment as a matter of law on the undisputed material facts. Moreover, on summary judgment, "the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United*

17. More realistically, the AFL-CIO implicitly concedes that in such an event a trial would be required to resolve the case. (See their brief at page 17 note 10.)

States v. Diebold, Inc., 369 U.S. 654 (1962); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

It is clear that the facts in the instant case are in dispute and that the record is incomplete.[18] Accordingly, summary judgment was improper, and the judgments below should be reversed.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in Petitioners' Brief, the judgment of the Court of Appeals and District Court should be reversed.

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18. Assuming arguendo that the issue set forth in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and the issue set forth in *Branti v. Finkel*, 445 U.S. 507 (1980) should have been applied by the courts below then further proceedings are necessary to make the proper factual determinations required by either or both of these decisions. It must be observed however that petitioners do not necessarily agree that either standard should be applied. It must also be noted that the standards developed in the *Mount Healthy* and *Branti* decisions were arrived at only after plenary trials.